Supreme Court, U.S.
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No. 85-1374

In The
Supreme Court of the United States
October Term, 1985

THE ESTATE OF WILLIAM LOEB,
THE WILLIAM LOEB
UNION LEADER TRUST, NACKEY S. LOEB
(Individually, as Executrix of the Estate
of William Loeb, and as Trustee
of the William Loeb Union Leader Trust),
AND THE SECURITY BANK OF NEVADA,

Petitioners,

vs.

RICHARD R. BERGERON,

Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MICHAEL C. HARVELL
SHEEHAN, PHINNEY, BASS & GREEN
PROF. ASS'N
1000 Elm Street
Manchester, New Hampshire 63101
603/668-0300

Attorneys for Respondent

On the Brief:

MARK F. WEAVER

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

27 pp

QUESTIONS PRESENTED FOR REVIEW

Respondent believes that petitioners did not correctly state the second issue before this Court. Petitioners' second issue characterizes the plaintiff's claim in the United States District Court for the District of New Hampshire as in rem in character. That claim was one for declaratory and equitable relief and the petitioners' statement of the issue as involving an in rem proceeding is misleading. Respondent believes the questions presented are:

1. Whether the issue presented by this case is of sufficient importance to warrant review by this Court.

2. Whether the Full Faith and Credit Clause of the United States Constitution requires dismissal of federal court claims not involving parties, or their privies, to an earlier state court action.

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THE ESTATE OF WILLIAM LOEB,
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UNION LEADER TRUST, NACKEY S. LOEB
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vs.

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On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Richard R. Bergeron,
respectfully prays that the Petition
For Certiorari be denied.

OPINIONS BELOW

Respondent wishes to add the following opinion to those cited by the petitioners:

February 12, 1986: Order, United States District Court for the District of New Hampshire—Respondent's Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

In addition to those statutory provisions cited by petitioners, respondent wishes to cite the following:

Nevada Revised Statutes:

> 147.130. Rejection of claim; notice; time to file suit; service of summons; removal of executor or administrator for default.
>
> 1. When a claim is rejected by the executor or administrator or the district judge, in whole or in part, the holder must be immediately notified by the executor or administrator, and the holder must bring suit in the proper court against the executor or administrator within 60 days after such notice whether the claim is due or not; otherwise the claim is forever barred. If the holder of a claim resides out of the county, he may be informed of the rejection of his claim by written notice forwarded to his post office address by registered or certified mail.

STATEMENT OF THE CASE

Respondent believes it is necessary to provide some additional information regarding the petitioners' statement of the case. The plaintiff first filed his creditor's claim against the estate of William Loeb with the executrix of the estate on March 16, 1982. (*See* Petitioner's Appendix A). After the executrix, Nackey Loeb, denied the claim, (*See* Appendix A), plaintiff sought to pursue that claim in the federal district court in the State of New Hampshire, believing that court to be a proper court in which to bring such a claim under NRS 140.130. That statute provides that creditor's claims against an estate, once denied by the executrix, must be brought in the "proper court" within sixty (60) days of notice of such denial. The complaint filed in New Hampshire, however, involved much more than the plaintiff's claims against the estate. The plaintiff's complaint stated claims sounding in contract, tort and fraud and were brought against the estate, Nackey Loeb as executrix, the William Loeb Union Leader Trust, Nackey Loeb as trustee and the Security Bank of Nevada, seeking declaratory and equitable relief regarding shares of the Union Leader corporation held by the William Loeb Union Leader Trust. (*See* Petitioners' Appendix B). Subsequent to the bringing of plaintiff's complaint in federal court, Nackey Loeb, in her capacity as executrix of the estate, brought a declaratory judgment action in Nevada state court. That action sought to have the court declare that the plaintiff's claims against the estate were forever barred because they were not brought in the proper court within sixty (60) days of the denial of the plaintiff's claim by the executrix, as required by Nevada law. (*See* Petitioners' Appendix D).

Petitioner Nackey Loeb's request for a declaratory judgment was granted by the Nevada Court and the plaintiff appealed that decision to the Nevada Supreme Court, arguing that the federal court in New Hampshire was a proper court in which to bring his claims against the estate pursuant to Nevada law (*See* Petitioners' Appendix J, at 56a).

The Nevada Supreme Court affirmed the decision, holding that the plaintiff's claims against the estate were forever barred. The Nevada Supreme Court stated in its decision that "The sole issue addressed is whether the district court erred in interpreting NRS 147.130(1) as barring with prejudice the appellant's claim against the estate." (*See* Petitioners' Appendix J, at 55a-56a).

The petitioners then sought to plead this decision as a bar to all of the plaintiff's claims in federal court in New Hampshire, an argument accepted by the New Hampshire District Court. (*See* Petitioners' Appendix N). This decision was affirmed by the First Circuit Court of Appeals only as it related to the estate of the executrix and was reversed as to the other parties to the federal action. The Circuit Court held:

> [T]he fact remains that neither the trust, the trustee, nor the bank were parties to the Nevada declaratory action, and the merits of Bergeron's claims against these parties were not before the Nevada Court. It follows that any view the Nevada Supreme Court expressed or implied as to Bergeron's claims has no res judicata effect here.

(*See* Petitioners' Appendix R, at 89a) (citations omitted).

The petitioners now seek a writ of certiorari regarding the Circuit Court's opinion.

ARGUMENT

Petitioners ask this Court to grant a writ of certiorari. Their brief, however, fails to address why certiorari should be granted. In fact the arguments raised by the petitioners do not rise to the level of importance required for the granting of a writ of certiorari pursuant to the rules of this Court. This case lacks the issues of constitutional, legal or public significance for the granting of certiorari.

I. Petitioners Have Not Provided Any Special or Important Reasons For Granting a Writ of Certiorari.

The Rules of the Supreme Court of the United States provide that: "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Sup. Ct. R. 17.1. Thus, a writ of certiorari may be granted when a federal court of appeals hands down a decision conflicting with the decision of another federal court of appeals on the same issue, or decides a federal question such that its decision conflicts with a state court of last resort, or when a federal court of appeals has decided an important question of federal law which should be settled by the Supreme Court. *Id.* at 17.1 (a) and (c). In any case, however, the petition for writ of certiorari must contain "A direct and concise argument amplifying the reasons relied on for the allowance of the writ." *Id.* at 21.1 (j).

This Court has read the above rules to require that the issues presented be "beyond the academic or the epi-

sodic." *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955). Cases considered should be important "to the public, as distinguished from that of the parties and in cases where there is a real and embarassing conflict of opinion and authority between the Circuit Courts of Appeals." *Id.* at 79, *citing Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387 (1923). The petition for writ of certiorari in this case simply fails to meet any of these requirements.

The petitioners' brief argues that this Court should consider whether the First Circuit Court of Appeals erred in its application of the doctrines of res judicata and abstention. Nowhere, however, do the petitioners present any reason or basis for this Court to grant a writ of certiorari. The petitioners' brief does not contain any "direct and concise" argument expanding upon the reasons for allowing the writ. We assume this is so because none exists. The decision of the First Circuit in this matter did not conflict with any decision of another federal circuit court on the same issues, nor did it decide a federal question in such a way as to conflict with the decision of a state court of last resort. (*See* Petitioners' Appendix R). Plainly. the issues raised by the petitioners are issues important to only the petitioners. This case does not involve any issues important to the public and the writ of certiorari should not be granted.

II. The Decision of the Circuit Court Gave Full Faith and Credit to the Decision of the Nevada Supreme Court.

One of the questions presented by the petitioners' petition is whether the First Circuit's application of the doctrine of res judicata gave full faith and credit to an

earlier decision of the Nevada Supreme Court involving a declaratory judgment action brought by the petitioner, Nackey Loeb, as executrix of the estate of William Loeb. The doctrine of res judicata provides that a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Parklane Hosiery Co. v. Shore,* 429 U.S. 322, 327 n.5 (1979) *citing* 1B J. Moore, Moore's Federal Practice para. 0.405[1] (2d ed. 1984). The Constitutional requirement of full faith and credit, U.S. Const. art. IV, § 1, is closely associated with the doctrine of res judicata such that a judgment that is res judicata in the jurisdiction which entered it is res judicata in all courts. *See, Kremer v. Chemical Const. Corp.,* 456 U.S. 461 (1982). The res judicata effect of a judgment, however, is limited to the parties to an action and their privies. In this action, the judgment asserted as having res judicata effect involved only Bergeron and the petitioner, Nackey Loeb, as executrix for the estate of William Loeb. Not one of the other parties before this Court today was involved. To understand the absurdity of petitioners' argument that the Nevada decision should be given full faith and credit as to all parties before this Court, it is necessary to review the procedural history of this case.

Nevada Revised Statutes 147.040 requires that those having claims against an estate must file their claims within ninety (90) days of notice of the executor's or executrix's appointment. NRS 147.040. The plaintiff, Richard Bergeron complied with this statute (*See* Petitioners' Appendix A), and his claim was denied by the petitioner, Nackey Loeb, as executrix of the estate of William Loeb. (*See* Respondent's Appendix A). Pursuant to NRS 147.

130(1), the plaintiff was required to bring suit in "the proper court against the executor or administrator within sixty (60) days after such notice [of rejection] . . . otherwise the claim shall be forever barred." NRS 147.130(1).

The plaintiff, taking the New Hampshire Federal District Court to be a "proper court" under the statute, brought his claims in that court. (*See* Complaint Filed in United States District Court for the District of New Hampshire, Petitioners' Appendix B). The claims brought in the District Court, however, involved more than a claim against the estate of William Loeb. Bergeron's claims sounded in contract, tort and fraud, and sought, in addition to other relief, the imposition of a constructive trust on the Union Leader stock Loeb, during his lifetime, had transferred into trust and out of his employee's reach. (*See* Petitioners' Appendix B). Therefore, the action brought in federal court named not only the estate of William Loeb and its executrix as defendants, but also named the William Loeb Union Leader Trust, its trustee and the Security Bank of Nevada as defendants.

After plaintiff brought these claims, the petitioner, Nackey Loeb acting *only* as executrix of the estate, brought a declaratory judgment action in Nevada requesting that the court declare that the plaintiff's claims were forever barred because his claims were not filed in the proper court within the sixty day limitation of NRS 147.130(1), the proper court being the Second Judicial District Court of Washoe County, Nevada. (*See* Petitioners' Appendix C). The request for declaratory judgment was granted and that decision was appealed to the Nevada Supreme Court. At the beginning of its decision affirming the Washoe County District Court's

holding that Bergeron's claims were forever barred, the Nevada Supreme Court stated: "The sole issue addressed is whether the District Court erred in interpreting NRS 147.130(1) as barring with prejudice appellant's claim against the estate." (*See* Petitioners' Appendix J). Bergeron's appearance in that action, as the decision of the Nevada Supreme Court recognizes, was solely to argue that his claims against the *estate* of William Loeb had been brought in the "proper court" under the Nevada statute. (*See* Petitioners' Appendix J, at 56a).

Upon the entry of the ruling that plaintiff's claims against the estate were barred, the petitioners sought to dismiss the action in the federal court in New Hampshire based on the doctrines of res judicata and abstention, a request which was granted by the court. (*See* Petitioners' Appendix N). That decision was reversed in part by the First Circuit Court of Appeals. The Circuit Court held that the doctrines of res judicata and abstention do not apply to bar suit against the William Loeb Union Leader Trust, its trustee and the Security National Bank of Nevada. (*See* Petitioners' Appendix R). Petitioners now seek to resurrect their arguments and the decision of the New Hampshire District Court before this Court. These efforts simply must fail.

The declaratory judgment action brought in Nevada was brought by Nackey Loeb as executrix for the estate of William Loeb and in no other capacity. The only issue decided was whether Bergeron's claim against the estate was forever barred under Nevada law. The merits of the plaintiff's claims against the trust, the trustee and the bank were never raised or considered because they

were not parties to the action. Thus, the decision can have no res judicata effect as to the plaintiff's claims against those parties in federal court. *See, Stein v. Mutual Clerk's Guild of Mass., Inc.,* 560 F. 2d 486, 490 (1st Cir. 1977).

The fallacy of the petitioners' arguments rests in the assertion that the plaintiff's complaint filed in federal court in New Hampshire is the same claim as that asserted against the Loeb Estate in Nevada. The plaintiff's claims in Nevada, however, were confined to the filing of a claim with the executrix, Nackey Loeb. Bergeron's New Hampshire action went much further, embracing claims against the estate, the executrix, the trust, the trustee, and the Security Bank of Nevada. These claims principally called for equitable relief. Although the complaint included the claims against the estate which the plaintiff sought to pursue under Nevada law, the complaint also encompassed all of the claims Bergeron had against the estate and the executrix, as well as the trust, the trustee and the bank. The scope of the Nevada proceedings was far more limited than the scope of the proceedings in the New Hampshire District Court. Moreover, only the estate, the executrix and Bergeron were parties to the Nevada action. This fact becomes important in light of Nackey Loeb's status as executrix of the estate and as trustee of the William Loeb Union Leader Trust. Since the declaratory judgment action in Nevada was commenced by Nackey Loeb *only* as executrix of the estate, one must assume that the interests of the trust were not at stake in the proceedings. Therefore, that decision can be given res judicata effect only as to the executrix and the estate of William Loeb.

For the same reason, the plaintiff's claims are not moot. A real controversy exists between Bergeron and the trust, the trustee and the bank. This controversy is in no way diminshed by the absence of the executrix and the estate as parties. In fact, the New Hampshire District Court has ruled that the estate and the executrix are not indispensable parties in the plaintiff's action, and that the plaintiff can receive complete relief without either as parties to the action. (*See* Appendix B, at A-6).

The decision of the First Circuit Court of Appeals gave full faith and credit to the Nevada Supreme Court's decision. It called for the dismissal of the plaintiff's claims against the executrix and the estate. No broader application of the Nevada decision is warranted or justified and the petitioners' arguments must fail.

III. Abstention By the United States District Court for the District of New Hampshire was Properly Reversed by the First Circuit Court of Appeals.

Throughout this litigation, the petitioners have portrayed the instant suit as a proceeding in rem in nature. Thus, their arguments hold that since the Nevada Courts first acquired jurisdiction over the trust res, the New Hampshire federal court must abstain to prevent any interference with that jurisdiction. This argument ignores the nature of the action brought by plaintiff and misapplies the abstention doctrine.

Initially, this Court must recognize that the Nevada Court's exercise of jurisdiction over the trust res was not a part of the petitioners' declaratory judgment action. Instead, it was merely a confirmation of the appointment

of Nackey S. Loeb as the trustee of The William Loeb Union Leader Trust. (*See* Petitioners' Appendix D). This fact was recognized by the First Circuit. (*See* Petitioners' Appendix R, at 89a n.5). Moreover, the trust is an inter vivos trust whose assets have never passed through the Loeb estate. (*See id.* at 89a n.6). Ignoring these facts, the petitioners strain to argue that the New Hampshire federal court's abstention should be affirmed.

Bergeron's claims in New Hampshire sought declaratory relief, including a declaration of Bergeron's right to the assets of the trust and the imposition of a constructive trust. Such an exercise of jurisdiction does not require that the District Court abstain from the action. *See, Federal Savings and Loan Insurance Corporation v. Krueger,* 435 F. 2d 633 (7th Cir. 1980). Thus, the principle stated in *Princess Lida v. Thompson,* 305 U.S. 456 (1939), requiring that when two courts attempt to exercise in rem jurisdiction over the same property, jurisdiction in one court should yield to the court first exercising jurisdiction over the res, does not apply if "the plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in possession of a state court . . . ." *Id.* at 466.

Beyond any argument regarding jurisdiction over the res at issue, the petitioners ignore this Court's holding that abstention is an extraordinary exercise of federal restraint designed to maintain our federalism in exceptional circumstances. *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1 (1983). None of the factors required for abstention under *Colorado River Water Conservation District v. United States,* 424

U.S. 800 (1976), or *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), are present in this action.

The *Colorado River* abstention doctrine requires that a court find a clear justification for abstention by considering the following factors: 1) which court first assumed jurisdiction over the property; 2) the avoidance of piecemeal adjudication; 3) the order in which jurisdiction was obtained; and 4) the convenience of the federal forum. *Colorado River, supra,* at 816-20. This is not a mechanical checklist, but a list of factors to be balanced in each case. *Moses H. Cone, supra,* at 17. The first factor, jurisdiction over the property, should be considered with the third factor, that being the order in which jurisdiction was obtained. The plaintiff brought this action in federal court on June 7, 1982. It was not until July 13, 1982, after the petitioner, in reaction to this suit, had brought her petition for declaratory judgment, that the Nevada Court held it had jurisdiction over the William Loeb Union Leader Trust and the shares of stock held by that trust. Thus, the New Hampshire federal court first obtained jurisdiction over the trustee, even if the Nevada court was the first to specifically find it had jurisdiction over the trust res. Since the plaintiff's complaint is an action in personam, it is the jurisdiction over the trustee and not the trust res which is determinative.

Concerning the fourth factor, the convenience of the federal forum, there can be no dispute that the New Hampshire Federal District Court is the most convenient forum for this action. The plaintiff resides in New Hampshire and the Manchester Union Leader is located in New Hampshire as well. In addition, the promises made by William Loeb which form the basis for this suit, were made

in New Hampshire to the New Hampshire employees of the Manchester Union Leader. Moreover, the New Hampshire United States District Court has jurisdiction over Nackey Loeb, the trustee of the William Loeb Union Leader Trust. There could not be a more convenient forum than that provided by the New Hampshire Federal District Court.

Lastly, the exercise of jurisdiction by the New Hampshire Federal District Court will not result in piecemeal adjudication. Petitioners' arguments that since the plaintiff's claim against the Loeb estate is barred, any declaration of rights regarding the trust will result in a piecemeal adjudication of rights, ignores those federal cases upholding the power of a federal court to declare the rights of a claimant to a trust even when in rem jurisdiction over the res exists in another state court proceeding. *See, Federal Savings and Loan Insurance Corp., supra,* at 636-37. Moreover, on remand from the First Circuit, the New Hampshire District Court has ruled that the law of New Hampshire applies to the claims in this action. (*See* Appendix B). Thus, the most appropriate court for the consideration of this action is the Federal District Court in New Hampshire.

The petitioners' reliance on *Burford* abstention is equally misplaced. The District Court and the petitioner attempt to apply *Burford* abstention because, they argue, the adjudication of Bergeron's claims will disrupt the efforts of Nevada's courts to establish a coherent policy regarding the administration of estates. Aside from the fact that the Loeb estate is no longer a party to this action and the assets of the trust are not, and have never been, part

of the estate, this argument must fail. The ability of federal courts to entertain suits to establish a creditor's claim against an estate has long been upheld. *See, Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909); *Hess v. Reynolds*, 113 U.S. 73 (1885); *Greyhound Lines v. Lexington State Bank & Trust Co.*, 604 F. 2d 1151 (8th Cir. 1979); *Monogram Industries, Inc. v. Zellen*, 467 F. Supp. 122 (D. Mass. 1979). Yet, petitioners seek to question such an exercise of jurisdiction in this case. Clearly, there is no justification for abstention in the present case.

CONCLUSION

The petitioners have failed to demonstrate or address the reasons for this Court to grant certiorari. Moreover, their arguments regarding the res judicata effect of the decision of the Nevada Supreme Court overlook the limited scope and effect of that proceeding regarding the parties to this action. Finally, the exercise of jurisdiction by the New Hampshire Federal District Court is both warranted and justified. The doctrine of abstention is an extraordinary exercise of discretion which should not be applied to Bergeron's claims.

Respectfully submitted,

MICHAEL C. HARVELL

SHEEHAN, PHINNEY, BASS & GREEN
PROF. ASS'N
1000 Elm Street
Manchester, New Hampshire 03101
603/668-0300

Attorneys for the Respondent

ON THE BRIEF:

MARK F. WEAVER

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APPENDIX A

No. 81-10236
Dept. No. 9

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

In the Matter of the Estate

of

WILLIAM LOEB,

Deceased

NOTICE OF REJECTION OF CLAIM

To: RICHARD R. BERGERON
RFD 2, Danis Park Road,
Goffstown, New Hampshire 03045

NOTICE IS HEREBY GIVEN that your Claim, sworn to March 16, 1982, filed with the Clerk of the above-entitled court on March 17, 1982, was rejected as to the whole thereof, by the undersigned Executrix of the estate on March 29th, 1982, and the Rejection was filed with the Clerk of the above entitled court on April 5, 1982.

DATED, April 5, 1982.

/s/ Nancy S. Loeb
Executrix

APPENDIX B

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Richard R. Bergeron

v. #C82-317-L

Estate of William Loeb et al.

ORDER

After this court dismissed plaintiff's claim against all defendants, plaintiff appealed to the First Circuit Court of Appeals. *Bergeron* v. *Loeb,* No. 85-1340, slip. op. (1st Cir. November 25, 1985). The court affirmed the dismissal of Counts II-V against the defendants estate of William Loeb and Nackey Loeb as executrix. *Id.* at 21. The court vacated this court's dismissal of Counts II-IV against the trust, Nackey Loeb as trustee and the Security National Bank of Nevada. *Id.* Plaintiff did not appeal this court's award of summary judgment in favor of defendants on Count I, the federal securities claim. *Id.* at 6.

The First Circuit Court of Appeals remanded the case to this court with the suggestion that

> the district court may wish to consider, *inter alia,* (1) what state's law governs the disposition of these claims; and (2) whether and to what extent, if any, Bergeron can properly proceed with these claims now that Loeb's estate and Nackey S. Loeb in her capacity as executrix are no longer parties to the federal action.

Id. at 21.

I. *What state's law governs the disposition of this case?*

Plaintiff claims that the law of New Hampshire should apply to the present case; defendants claim Nevada law should apply. Defendants further contend that the present proceedings are *in rem* and the trust is under the jurisdiction of the Nevada district court.

In a diversity case, a federal district court must apply the choice of law rules of the forum state. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).

Under New Hampshire choice of law rules, the court must apply the law of the state with the most significant contact with the acts complained of by the plaintiff. *Diamond International Corp. v. Allstate Ins. Co.*, 712 F.2d 1498, 1501-02 (1st Cir. 1983); *Wise v. Kentucky Fried Chicken Corp.*, 555 F. Supp. 991, 994 (D.N.E. 1983); *Consolidated Mutual Ins. Co. v. Radio Foods Co.*, 108 N.H. 494, 496-97 (1968).

Plaintiff's action in the present case is not an *in rem* proceeding. As the Nevada Supreme Court acknowledged, the present case "essentially petitions [the New Hampshire] court to determine the ownership of the trust *res* which is under the jurisdiction of the Nevada district court." *Bergeron v. Loeb*, 675 P.2d 397, 401 (Nev. 1984) (per curiam)

This court finds that New Hampshire law is the applicable law in the disposition of the present case. Plaintiff's claims are for breach of contract and fraud. The acts complained of by plaintiff occurred in New Hampshire while plaintiff was an employee of the Union Leader, a New Hampshire newspaper, incorporated in New Hamp-

shire. It is clear that the state the most significant relationship to the acts complained of by plaintiff is New Hampshire.

Accordingly this court will apply the law of New Hampshire to the present action.

II. *Whether plaintiff can proceed in the present action against the estate of William Loeb and Nackey Loeb as executrix of the estate.*

Defendants claim that the plaintiff's case cannot proceed without the estate of William Loeb and the executrix as parties. Plaintiff claims that the estate and executrix are not necessary or indispensable parties under Fed. R. Civ. P. 19, and therefore he may proceed against the trust, the trsutee and the bank.

Rule 19 (a)-(b) of the Fed. R. Civ. P. provides:

> *(a) Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

> *(b) Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

The estate of William Loeb and the executrix are not necessary parties to the present action. The shares of stock in question were transferred to an *inter vivos* trust; they were only part of the estate for federal estate tax purposes. The First Circuit acknowledged that "[a]t least one state has upheld the right of a plaintiff to sue to impose a constructive trust upon personalty transferred to an innocent third party without joinder of the representative of the decedent who committed the alleged fraud." *Bergeron v. Loeb,* slip. op. at 13 (citing *Simonds v. Simonds,* 58 A.D.2d 305, 396 N.Y.S. 2d 547 (App. Div. 1977), *aff'd,* 45 N.Y. 2d 233, 408 N.Y.S. 2d 369, 380 N.E. 2d 189 (1978); Restatement of Restitution § 168 (1937); 5 A. Scott, *The Law of Trusts* § 470, at 3444-45 (1967)). New Hampshire law does not dictate a different result.

Although defendant cites *Estate of Wood,* 122 N.H. 956 (1982), that case is not dispositive of the present action. That case involved a testamentary trust where the

second wife waived the provisions of the will and sought her statutory share of the estate. The court had to decide whether New Hampshire or Massachusetts law applied.

There is no reason why the present case cannot proceed against the trust, the trustee and the bank. Complete relief can be accorded the parties since the assets in question are part of the inter vivos trust. The estate's absence will not impede its ability to protect any interest it may have. Further, even assuming the dismissed parties were necessary under Rule 19(a) they would not be indispensable under Rule 19(b). Plaintiff would have no other remedy if the case were dismissed for non-joinder since he may not maintain an action against the dismissed parties. Further, an adequate judgment may be rendered in the absence of the estate and executrix. Any prejudice which might conceivably exist can be lessened or avoided by the shaping of the relief granted by this court.

Accordingly, this court finds that the present action may proceed against the William Loeb Union Leader Trust, Nackey Loeb trustee and the Security National Bank of Nevada.

February 12, 1985

/s/ Martin F. Loughlin
U.S. District Judge

Alan P. Cleveland, Esq.
Michael Hanks, Esq.
Ralph Warren Sullivan, Esq.